IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 29, 2006

STATE OF TENNESSEE v. MICHAEL LEE HOGAN

Appeal from the Circuit Court for Dickson County
No. CR5649 Robert E. Burch, Judge

No. M2006-00510-CCA-R3-CD - Filed January 9, 2007

The Appellant, Michael Lee Hogan, appeals the Dickson County Circuit Court's denial of his motion to withdraw his guilty plea. Hogan pled guilty to one count of Class C felony sale of cocaine and, under the terms of the plea agreement, received a twelve-year sentence as a Range II offender. Although Hogan was sentenced as a Range II offender, his sentence of twelve years falls within the sentence range of a Range III, persistent offender. On appeal, Hogan asserts that the trial court erred by refusing to grant his motion to withdraw his guilty plea because his sentence is illegal as it exceeds the sentence range for a Range II offender. Following review of the issue, we affirm the trial court's denial of the motion.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Michael Lee Hogan, *Pro Se*, Wartburg, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Ray Crouch, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On August 28, 2001, a Dickson County grand jury returned a two-count indictment against the Appellant charging him with sale of cocaine less than .5 grams for offenses occurring on December 21, 2000, and January 3, 2001. The following facts were established on a prior direct appeal:

> On May 21, 2003, the [Appellant] pled guilty to one count of the sale of less than .5 grams of cocaine, a schedule II controlled substance [, with the remaining count being *nolle prosequi*]. At the guilty plea submission hearing, the State explained that, according to the plea agreement, the [Appellant] would plead guilty in exchange for a twelve-year sentence, as a range II multiple offender, at thirty-five percent, and the [Appellant] would receive a $2000.00 fine. The State noted that the [Appellant's] sentence would run concurrently with three other sentences that the [Appellant] had to serve but consecutively to a six year parole violation sentence that the [Appellant] was serving at that time. Further, the State informed the court that the [Appellant's] twelve-year sentence was outside the statutory range for a Range II offender convicted of a class C felony.

State v. Michael Lee Hogan, No. M2003-02830-CCA-R3-CD (Tenn. Crim. App. at Nashville, May 3, 2005). The judgment of conviction entered in the case reflects that the Appellant was sentenced as a Range II, multiple offender to a term of twelve years. Additionally, in the comment section of the judgment form, the following appears: "It is recognized and agreed that the sentence of 12 years exceeds the range on a range II, multiple offender, and that the acceptance of this sentence is a part of and consistent with the plea agreement in this count on this case."

On June 9, 2003, nineteen days after entering his plea, the Appellant filed a *pro se* motion to withdraw his guilty plea, asserting that he had been coerced into pleading guilty because the trial court would not provide counsel who would go to trial. The trial court subsequently denied the motion for lack of jurisdiction without any evidence being presented. *Id*. The Appellant then filed an appeal to this court asserting that the trial court erred in denying the motion and that his sentence was illegal. Finding that the trial court did in fact have jurisdiction over the motion, a panel of this court remanded the case for a determination of whether the Appellant "can show that his guilty plea must be withdrawn to correct a 'manifest injustice.'" *Id*. The issue of an illegal sentence was not addressed. *Id*.

Following remand, a hearing was held on January 25, 2006. No additional evidence was presented, with only the prior transcripts of the Appellant's motion to withdraw his guilty plea being presented for the trial court's review. The Appellant limited the issue to the question of whether his sentence was illegal, with arguments being presented by both the State and the Appellant. The trial court took the matter under advisement and, on February 6, 2006, entered a memorandum opinion denying the motion. The court specifically found that the sentence was not illegal and that the guilty plea had been entered knowingly and voluntarily. The Appellant subsequently filed the instant timely appeal.

Analysis

On appeal, the Appellant argues that the trial court erred in denying his motion to withdraw his guilty plea because the sentence, as reflected on the judgment of conviction, is illegal. Specifically, he argues that "his plea and sentence are both void and illegal and the trial court was without the authority to accept such in that a Range II Sentence of twelve (12) years for a Class C

felony exceeds the ten year limitation placed on a Range II Class C Felony and Appellant did not agree to a Range II release eligibility with Range III Sentencing." Tennessee Rules of Criminal Procedure 32(f) provides:

> A motion to withdraw a plea of guilty may be made upon a showing by the defendant of any fair and just reason only before sentence is imposed; but to correct manifest injustice, the court after sentence, but before the judgment becomes final, may set aside the judgment of conviction and permit the defendant to withdraw the plea.

Rule 32(f) does not define "manifest injustice;" however, on a case-by-case basis, reviewing courts of this state have recognized conditions that meet this standard. *State v. Crowe*, 168 S.W.3d 731, 742-43 (Tenn. 2005). Our supreme court has summarized several instances of the need to correct manifest injustice:

> (1) the plea "was entered through a misunderstanding as to its effect, or through fear and fraud, or where it was not made voluntary"; (2) the prosecution failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, . . . 83 S. Ct. 1194 (1963), and this failure to disclose influenced the entry of the plea; (3) the plea was not knowingly, voluntarily, and understandingly entered; and (4) the defendant was denied the effective assistance of counsel in connection with the entry of the plea.

Id. at 743. However, a court should not allow the withdrawal of a guilty plea when the claim of manifest injustice "is predicated on" (a) an accused's 'change of heart,' (b) the entry of the plea to avoid harsher punishment, or (c) an accused's dissatisfaction with the harsh punishment imposed by the trial court or a jury." *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). Moreover, the defendant bears the burden of establishing that a plea should be withdrawn "to prevent 'manifest injustice.'" *Id*.

Our supreme court has recently explained the standard for reviewing a trial court's denial of a motion to withdraw a guilty plea as follows:

> A defendant does not have a unilateral right to withdraw a plea. Whether a defendant should be permitted to withdraw a plea is a matter addressed to the sound discretion of the trial court, regardless of when the motion is filed. The trial judge "should always exercise his discretion with caution in refusing to set aside a plea of guilty, to the end that one accused of crime may have a fair and impartial trial." "When a constitutional violation is shown, the trial court's discretion is strictly curtailed." The trial court's decision "will not be reversed unless it clearly appears that there was an abuse of discretion." An abuse of discretion exists if the record lacks substantial evidence to support the trial court's conclusion.

Crowe, 168 S.W.3d at 740 (internal citations omitted).

In denying the instant motion to withdraw the guilty plea, the trial court specifically found:

> On the 21st day of May 2003, [the Appellant] entered a plea of guilty to Count 2 of the indictment, which charged sale of less than .5 grams of cocaine. The plea bargain was agreed to by both sides in the case and announced to the Court which approved it. [The Appellant] then received a sentence of twelve (12) years as a Range II offender. The Court noted that the sentence was outside the range allowed by law. The transcript of the entry of the guilty plea establishes that [the Appellant] was advised that his sentence was outside the range for a Range II sentence and agreed that he wished to accept this sentence. A nolle prosequi was entered as to Count I.
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> . . . .
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> The applicable sentence ranges for a Class "C" felony are:
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> > Range II: Not less than 6 years nor more than 10 years confinement
> > Range III: Not less than 10 years nor more than 15 years confinement
>
> T.C.A. § 40-35-112.
>
> The State filed a notice of enhancement, indicating that [the Appellant] was a Range III Offender. The records of this Court reflect that this is the case.
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> The parties entered into a plea agreement whereby Count I would be dismissed and [the Appellant] would plead guilty to a Range III sentence (12 years) but with Range II release eligibility. Nineteen days after making this agreement, [the Appellant] filed a motion to withdraw his guilty plea. At the hearing of this motion, [the Appellant] argues that this sentence is void because a twelve year sentence is outside the range of punishments allowed for a Range II sentence. . . .
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> . . . .
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> [The court, relying on *Brian K. Mitchell v. Tony Parker, Warder*, No.W2004-01246-CCA-R3-HC (Tenn. Crim. App. at Jackson, Dec.10, 2004), found that the Appellant] was properly sentenced to a Range III punishment and, as part of the plea agreement, allowed a Range II classification and release eligibility. This is a proper procedure. [The Appellant's] claim is without merit. He has not demonstrated that his sentence was illegal nor that it was involuntary.

The State argues that the Appellant has waived review of the issue by failing "to include the transcript of the hearing on the motion to withdraw his guilty plea or his plea hearing in the record." Initially, we note that the record was supplemented, and a transcript of the motion hearing is now before us. However, the Appellant has failed to include a copy of his guilty plea agreement or a

transcript from his guilty plea hearing, which would reveal whether the Appellant was fully advised as to the terms of the plea agreement and expressly waived available sentencing rights. It is an appellant's obligation to prepare a record which will allow for meaningful review on appeal. Tenn. R. App. P. 24(b). The guilty plea document and transcript of the plea hearing are obviously critical to any review of the guilty plea and should have been included in the record. The Appellant asserts that he is not at fault because he requested these documents but that they were never provided. Because the record is sufficient for review, as well as the Appellant's allegation that he was not provided relevant items, we decline to address the issue of waiver.

In sum, the Appellant asserts that his sentence is illegal because it is in contravention of the 1989 Sentencing Act as the twelve-year sentence exceeds the ten-year limitation for a Range II, Class C felony. The Appellant is correct in that his twelve-year sentence does exceed the limit for a Range II offender convicted of a Class C felony, which is capped at ten years. *See* T.C.A. § 40-35-112(b)(3) (2006). No argument is made by the Appellant, however, that he did not in fact agree to this sentence.

In support of his argument to withdraw his guilty plea, the Appellant relies upon *McConnell v. State*, 12 S.W.3d 795 (Tenn. 2000) and *State v. Richard Dale Filauro*, No. M2002-02186-CCA-R3-CD (Tenn. Crim. App. at Nashville, Apr. 16, 2004). He argues that his case is controlled by *McConnell* in which the Tennessee Supreme Court held that a defendant sentenced pursuant to the 1989 Sentencing Act must be sentenced under the limitations of the act, which the court stated "did not provide for coupling different incarceration and release eligibility ranges." *McConnell*, 12 S.W.3d at 798. We disagree with the Appellant's interpretation of *McConnell*. A panel of this court, in *Bland v. Dukes*, 97 S.W.3d 133 (Tenn. Crim. App. 2002), rejected an argument similar to the Appellant's, concluding that "the plea agreement in *McConnell* was nullified because it was expressed in terms of the 1982 Act, not because the number of years was outside the range." *Id.* at 135 (citing *Mark E. Oliver v. State*, No. M1999-02323-CCA-R3-PC (Tenn. Crim. App. at Nashville, Dec. 28, 2000)).

As noted, the Appellant further relies upon *Filauro* to support his argument of an illegal sentence. In that case, a defendant, as part of a plea agreement, pled guilty to two counts of rape of a child as a Range I offender and was sentenced to twenty-five years, the maximum sentence for a Range I offender. The agreement further provided that the defendant agreed to waive his pre-trial jail credits, which resulted in an actual sentence of 26.5 years. A panel of this court refused to uphold the sentence, finding it to be an illegal sentence. *Filauro*, No. M2002-02186-CCA-R3-CD.

However, we conclude that the Appellant's case is distinguishable from *Filauro*. The *Filauro* court concluded that the sentence was illegal because the "defendant never agreed to be sentenced as a Range II offender, and the judgment form reflects that he was, in fact, sentenced as a Range I standard offender." Our review indicates that the holding was based upon the fact that the defendant was not made aware of, and the judgment form failed to reflect, that he was accepting a sentence outside the range for which he was sentenced, not that such a sentence was illegal per se.

Our supreme court has held that "offender classification and release eligibility are non-jurisdictional and legitimate bargaining tools in plea negotiations under the Criminal Sentencing Reform Act of 1989." *Bland*, 97 S.W.3d at 134 (citing *McConnell*, 12 S.W.3d at 798; *Hicks v. State*, 945 S.W.2d 706, 709 (Tenn. 1997)). In *Hicks*, a defendant pled guilty to a Class C felony and agreed to a hybrid sentence involving a Range II length of incarceration of ten years and a Range I release eligibility percentage of thirty percent. *Hicks*, 945 S.W.2d at 706. The court found that such hybrid sentences were permissible under the 1989 Act. *Id*. at 708-09.[1] Moreover, as noted, this court has further specifically held that "a knowing and voluntary guilty plea waives any irregularity as to offender classification or release eligibility." *Bland*, 97 S.W.3d at 135. A trial court has the jurisdiction to impose an agreed-upon sentence, the length of which falls outside the designated offender sentencing range but within the total maximum for the offense class. *Id*.; *see also Anthony C. Long v. Tony Parker*, No. W2003-02609-CCA-R3-CO (Tenn. Crim. App. at Jackson, Aug. 30, 2004). Here the Appellant pled guilty to a Class C felony, for which the authorized term of imprisonment is three to fifteen years. T.C.A. § 40-35-111(b)(3) (2006). As the Appellant's twelve-year sentence does not exceed the maximum term for the felony, it is not illegal. Moreover, the judgment form clearly reflects that the increased sentence was a condition of the plea agreement and that the Appellant was aware that it was outside the statutory range. Thus, no "manifest injustice" has been established.

CONCLUSION

Because we conclude that no "manifest injustice" has been established, the trial court's denial of the Appellant's motion to withdraw his guilty plea is affirmed.

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DAVID G. HAYES, JUDGE

[1] The Appellant also argues that he did not receive a hybrid sentence. He asserts that, contrary to the trial court's findings, he was "never set for a Range III Sentence with a Range II release eligibility date but set at Range II SENTENCING with a 12 year sentence that exceeded the ten year limitation on a range II, Class C felony sentence." He argues that this distinguishes his case from that of *Mitchell v. Parker*, upon which the trial court relied, in which a sentence was upheld because Mitchell's plea agreement stipulated that his sentence would be thirty years, the maximum sentence within Range III, but his release eligibility status would be thirty percent as a Range I, standard offender. As noted, the record in the instant case does not include a transcript of the guilty plea hearing or the guilty plea agreement. The trial court specifically found that the Appellant was given a Range III sentence with a Range II release eligibility, a hybrid sentence which is permissible. *See Bland*, 97 S.W.3d at 136. We have nothing before us to indicate that the trial court abused its discretion in making this determination. Moreover, in contrast to *Filauro*, although the judgment form reflects that the Appellant was sentenced a Range II offender, it also clearly reflects that the Appellant was aware that he was being sentenced to a term which exceeded that allowable under Range II.